

**ONTARIO
SUPERIOR COURT OF JUSTICE
(APPLICATION COMMENCED IN MILTON)**

B E T W E E N:

MICHAEL LESAGE

Applicant

– and –

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF
ONTARIO

Respondents

APPLICANT'S FACTUM

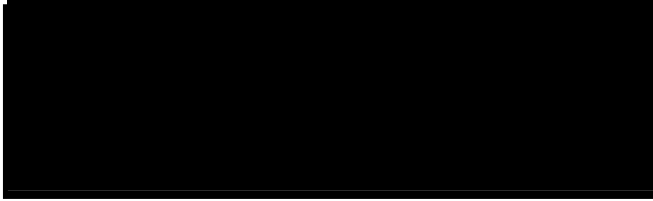
Dated: September 9, 2023

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PART I – OVERVIEW

1. This Application concerns whether a member of the public (who has written articles about the performance of the Ontario Superior Court of Justice for Canadian Lawyer, Slaw and The Lawyer’s Daily, among others) is entitled to production of court records and dockets. Specifically, Applicant is seeking production of both the number of civil cases that have gone to trial at various Ontario Superior Court of Justice courthouses by year, broken out by jury and non-jury trial, along with associated case numbers of such judgments (given the information contained within case numbers, this allows for the duration of proceedings to be determined). Such information has previously been provided to Applicant. Applicant asserts he is entitled to such information, which Respondent disputes.

PART II – FACTS

2. “Ontario’s court system is based on the fundamental principles of openness and accessibility¹.”

3. Applicant has in past requested information from the Ontario Superior Court of Justice, including the number of civil cases tried in 2019 at various courthouses, broken down by jury and non-jury trial, along with associated individual case numbers. This information was provided and is (partially) set forth at Exhibit 1 to the Application Record².

¹ Respondent’s Application Record, Exhibit A, pg. 8, Section 1: General principles and policies for public access.

² Application Record, Affidavit of Michael Lesage pg. 14, para. 2, Exhibit 1, Exhibit 2, pg. 31. The whole of this information provided was (and remains) published to my webpage <https://www.michaelsfirm.ca/how-long-does-it-take-civil-cases-to-get-to-trial-ontario/>.

4. Respondent has conceded that case numbers constitute ‘court records’³.
5. Case numbers, and specifically the first two digits to the right of the ‘CV’ i.e. ‘11’ in the exemplar case number, CV-11-00000001-0000, indicate the year the case was filed. Where the trial date is known (i.e. 2019), it is possible to determine how long it took for each case to get to trial⁴ (via simple subtraction, i.e. 19-11).
6. From the information previously provided and set forth at Applicant’s Exhibit “1”, Applicant was able to determine, for instance, that on average, jury trials in Toronto occurred 5 years and 9 months after claims were filed, whereas bench trials were held on average 4 years and 5 months post filing⁵. Such information has been published in articles by academics such as Suzanne Chiodo, and cited by Applicant in articles appearing in *Canadian Lawyer* and *Slaw*⁶.
7. Commencing around February 2022, Applicant requested the number of civil claims resolved by jury and non-jury trial at various courthouses, for the years 2015 through 2021 inclusive. Applicant was then informed that such records were ‘under the custody and control of the Superior Court of Justice’ and “would only be accessible with permission from the Court⁷.”

³ Respondent’s responses of August 29, 2023 to matters taken under advisement at cross-examination, number 14.

⁴ Cross-Examination Transcript of [REDACTED] August 3, 2023 at pg. 7, Q5, pg. 46, Q190 *see also* Application Record, Affidavit of Michael Lesage Exhibit 1

⁵ Application Record, Affidavit of Michael Lesage pg. 14, para. 2, Exhibit 1, Exhibit 2, pg. 31.

⁶ [Sorry, I Don’t Make the Rules: Taking Seriously Chief Justice Morawetz’s Call to Overhaul the Rules of Civil Procedure, Slaw, October 7, 2022, The Ontario Superior Court is attempting to hide poor performance behind a privacy excuse, How Well Is Chief Justice Morawetz Overseeing Ontario Superior Court Operations?](#)

⁷ Application Record, Affidavit of Michael Lesage, pg. 14, para. 3, Exhibit 2, pg. 23-24.

8. Applicant was subsequently informed that “information that could lead to personal identifiers will not be provided. Accordingly, case file numbers will not be provided.” In an effort to accommodate this ‘concern’ the request was then limited to the first 6 digits thereof, i.e. ‘CV-23-00’ which request was similarly denied⁸.

9. Cognizant of the open courts principle, Applicant next wrote to the Chief Justice requesting reconsideration, which request was denied⁹.

10. The Ontario Superior Court does not currently publish any statistics as to civil case duration¹⁰.

11. Additionally, the Ontario Superior Court ceased doing an annual report with the 2017-2018 year, for reasons unknown to the Ministry of the Attorney General¹¹.

12. However, through its ‘FRANK’ database, the Ministry of the Attorney General tracks the number of cases that have gone to civil jury and non-jury trial at individual courthouses by year. The FRANK database likewise contains associated case numbers for those matters, and the information previously provided (the information at Exhibit 1 to the Application record) came from the FRANK database¹².

⁸ Application Record, Affidavit of Michael Lesage, Exhibit 2, pg. 26-27.

⁹ Application Record, Affidavit of Michael Lesage pg. 31-35.

¹⁰ [RED BLOCK, YELLOW BLOCK, ORANGE BLOCK, BLUE: WITH SO MUCH COMPETITION, WHAT DO WE DO? Justice David Brown Court of Appeal for Ontario 14th Annual Straight From The Bench Conference Middlesex Law Association London, May 6, 2019](#) and [Moffitt v. TD Canada Trust, 2023 ONCA 349 \(CanLII\), note 2.](#)

¹¹ Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pgs. 29-30, Q108-109.

¹² Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pg. 24, Q78-85. Application Record, Affidavit of Michael Lesage, Exhibit 1.

13. On cross-examination, the Ministry of the Attorney General was obstructive and/or ill-prepared, with the following exchange being somewhat typical:

Q: [REDACTED] in terms of matters going to civil trial, the Ministry of the Attorney General, it has knowledge and awareness of when its employees, specifically registrars and clerks, are assigned to civil trials, agreed?

...

A: I don't know what's tracked. I don't know -- I'm not a manager of Court Operations. This is not within my personal knowledge.

Q: And so in terms of the answer that to this question, you know, would it be a manager of Court Operations that I would need to talk to to get the answers to that?

A: I don't think you are entitled to these answers¹³.

14. As indicated in [REDACTED] Affidavit, the Court Services Division of the Ministry of the Attorney General has “responsibility for the care and maintenance of court files and documents on behalf of the judiciary...” Despite such sworn statement, a similarly non-productive exchange occurred as follows:

Q: So, [REDACTED] with regard to the civil proceedings what records does the Ministry of the Attorney General itself retain custody and control of?

A: It is my understanding that records pertaining to civil trials are within the custody and control of the court.

Q. Okay. So [REDACTED] can you please direct your witness to listen to my questions and answer those questions that I ask as opposed to different questions.

[REDACTED] You have heard Mr. Lesage's comments.

Q. So, [REDACTED] will try my question again. The answer might be that the MAG retains no records whatsoever as to civil trials. So my question is with regard to civil proceedings, what records, if any, does the MAG maintain custody and control of?

¹³ Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pgs. 29-30, Q108-109.

A. So this is a legal question, and this is a question that I would provide a legal opinion on to my superiors. So I am not here as a legal expert¹⁴.

15. Over a 60 page transcript, Respondent tendered 40 refusals, while taking a further 19 matters under advisement, almost all of which were subsequently refused. These included matters that should not be controversial, such as:

- whether the Ontario Superior Court operates under the open courts principle;
- whether verdict forms are generated after jury trials;
- whether decisions are written after bench trials;
- whether the MAG would agree that the first six digits of case numbers do not contain any personal identifiers;
- whether the MAG is taking the position that production of the information sought is barred by statute or common law rule;
- whether she could point me to anything contained within her Affidavits or attachments thereto in support of the Ministry's position that I am not entitled to production of the civil case numbers sought;
- how court services division comes to learn when a civil trial has been concluded;
- what administrative records are maintained for civil cases;

¹⁴ Respondent's Application Records, [REDACTED] Affidavit at para. 2, Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pgs. 17-18, Q49-52.

- whether any part of the Ontario government is tracking any statistics, empirical data and/or performance metrics with regard to the functioning of the Ontario Superior Court of Justice;
- whether the Ministry of the Attorney General is aware of the number of open civil cases on the last day of a year, along with the number of cases closed during the year;
- whether it would agree that the public has an interest in knowing how long it is taking for civil cases to move through the Superior Court of Justice;
- whether there is any way for the public to know how long it is taking for civil cases to move through the Superior Court of Justice, in the absence of providing civil case numbers¹⁵;

16. Ultimately, [REDACTED] testified that where requests are made for an individual records or perhaps two¹⁶ (i.e. for a particular Statement of claim in an identified case, or the case name or number of an ongoing proceeding or one that had concluded) those would be provided. However, were the request instead for information in bulk (i.e. all verdict forms for civil jury trials in Toronto in 2020) then such request would be at the discretion of the Ontario Superior Court, who would apply unknown criteria in deciding whether to produce same. In practice, this means there were a request made for a specific (known) verdict form from a Milton civil trial for 2019, it would be provided, but were all (3 total)

¹⁵ Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pgs. 2-5, Refusals and Under Advisements Chart.

¹⁶ Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pgs. 54 Q228, Refusals and Under Advisements Chart.

2019 Milton verdict forms requested, same would be provided only at the discretion of the Ontario Superior Court¹⁷.

17. Everyday, the Ministry of the Attorney General post hundreds or even thousands of civil case numbers online on its daily court lists, along with in paper format in courthouses¹⁸.

18. On May 5, 2008, the Chief Justice of the Ontario Superior Court of Justice and Attorney General entered into a Memorandum of Understanding¹⁹. Section 7 thereof provides:

7. The Attorney General and the Chief Justice agree to develop a protocol that will outline, on a principled basis, when public access is appropriate to court-derived statistical information and documents.

To date, no such protocol has been developed²⁰.

PART III – ISSUES

- I. WHAT IS THE OPEN COURT PRINCIPLE AND HOW DOES IT APPLY HERE?
- II. HOW WOULD RESPONDENT’S POSITION, THAT IT CANNOT PRODUCE COURT RECORDS, AFFECT THE OPEN COURT PRINCIPLE?

¹⁷ Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pg. 28 Q104-105, pg. 34 Q128-132, pg. 50, Q218-222, Application Record of Michael Lesage, Exhibit 2.

¹⁸ Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pg. 39, Q158-160.

¹⁹ [Memorandum of Understanding between the Chief Justice of the Superior Court of Ontario and the Attorney General of Ontario, May 5, 2008.](#)

²⁰ Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pg. 61 Q272-279.

PART IV – LAW AND ARGUMENT

i. THE OPEN COURT PRINCIPLE MANDATES ACCESSIBILITY

19. “Information is at the heart of any legal system In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public. However, from time to time, the safety or privacy interests of individuals or groups and the preservation of the legal system as a whole require that some information be kept secret.” [*Named Person v. Vancouver Sun*, 2007 SCC 43 \(CanLII\)](#) at para. 1.

20. Accordingly, “the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.” [*Sherman Estate v. Donovan*, 2021 SCC 25 \(CanLII\)](#) at para. 1.

21. “Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.” [*Sierra Club of Canada v. Canada \(Minister of Finance\)*, 2002 SCC 41 \(CanLII\)](#) at para. 36. As such, s. 2(b) provides that “the state must not interfere with an individual’s ability to inspect and copy public records and documents, including judicial records and documents....

“Essential to the freedom of the press to provide information to the public is the ability of the press to have access to this information.” [Named Person v. Vancouver Sun, 2007 SCC 43 \(CanLII\)](#) at para. 33.

22. “With openness comes scrutiny, with scrutiny comes accountability and with accountability comes enhanced public confidence in the operation of state institutions.” [R. v. C.B.C. et al., 2013 ONCJ 164 \(CanLII\)](#) at para. 12.

23. These values are reflected in the Canadian Judicial Council’s Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, September 2005, which provides in pertinent part as follows (**bolding by Applicant**):

“Canadian courts have consistently held that the openness of court proceedings is an important constitutional principle that fosters many fundamental values, including public confidence in the judicial system, understanding of the administration of justice, and judicial accountability. Included within the open courts principle is the public’s right of access to court records.”

“Openness of court proceedings is a fundamental constitutional principle that ensures public confidence in the integrity of the court system, better understanding of the administration of justice and accountability of the judiciary. The open courts principle not only ensures that members of the public have a right to attend proceedings in the courtroom, but also that all information that is part of the court record and that is not confidential according to statutes or common law must remain open to public scrutiny.”

“Openness is the core principle upon which any policy for access to court records should be developed.”

1.3.3 Court Records

“Court records” include any information or document that is collected, received, stored, maintained or archived by a court in connection with its judicial proceedings. It includes, but is not limited to:

- a) case files;
- b) **dockets;**
- c) minute books;
- d) calendars of hearings;
- e) case indexes;
- f) registers of actions; and
- g) records of the proceedings in any form.

1.3.4 Docket

“Docket” means a data system in which court staff collect and store information about each proceeding initiated before the court, such as:

- a) information about the court division and type of case;
- b) **docket number;**
- c) names and roles of parties;
- d) names of counsel or solicitors of record;
- e) names of judges and judicial officers;
- f) nature of proceedings, including cause of action or criminal informations and indictments;
- g) information about the requested relief or amount of damages;
- h) list and corresponding filing dates of documents present in the case file;
- i) dates of hearings; and
- j) **dispositions with their corresponding dates.**

1.3.7 Personal data identifiers

“Personal data identifiers” refers to personal information that, when combined together or with the name of an individual, enables the direct identification of this individual so as to pose a serious threat to this individual’s personal security. This information includes:

- a) day and month of birth;
- b) addresses (e.g. civic, postal or e-mail);
- c) unique numbers (e.g. phone, social insurance, financial accounts);
and
- d) biometrical information (e.g. fingerprints, facial image).

“Personal data identifiers” does not include a person’s name.

4.1 Presumption of Access

Members of the public have presumptive right of access to all court records.

4.3 Existence of a Case File

Members of the public are entitled to know that a case file exists, even when a case file is sealed or subject to a non-publication order.

4.6 Type of Record and Means of Access

4.6.1 Judgments

Members of the public shall have on-site access and, where available, remote access to all judgments.

4.6.2 Docket Information

Members of the public shall have both on-site and, where available, remote access to docket information, provided that personal data identifiers are not made remotely accessible.

5.1 Request for Extended Access

Any member of the public may make a request for access to a portion of the court record that is otherwise restricted pursuant to this policy. The request shall be made in the form prescribed by the court. In deciding whether or not access should be granted, and what specific terms and conditions should be imposed, including the possibility of registered access, the following criteria shall be taken into consideration:

- a) the connection between the purposes for which access is sought and the rationale for the constitutional right to open courts;
- b) the potential detrimental impact on the rights of individuals and on the proper administration of justice, if the request is granted; and
- c) the adequacy of existing legal or non-legal norms, and remedies for their breach, if improper use is made of the information contained in the court records to which access is granted. This includes, but is not restricted to, existing privacy laws and professional norms such as journalistic ethics.

This model policy has been cited by the Ontario Superior Court, including in [*Cao v. Monkhouse Law Professional Corporation*, 2021 ONSC 7894](#) at para. 9.

24. In Ontario, these principles, to some extent, have been further codified by the [*Courts of Justice Act*, R.S.O. 1990, c C.43](#) which provides as follows:

Documents public

- 137(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

- (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

- (3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

25. Respondent, on its website, has further indicated that:

Upon payment of the prescribed fee, members of the public are entitled to see any current list maintained by the court of civil proceedings commenced, any documents filed in a civil proceeding, or any judgments entered, unless a statutory provision, common law rule or court order restricts access.²¹

26. Moreover, these principles are cited in Respondent's Exhibit A, 'Access court files, document and exhibits (posted online to 'enhance public access to court proceedings, information and documents), which provides that:

"Ontario's court system is based on the fundamental principles of openness and accessibility. In general, most court documents are publicly accessible, unless a statutory provision, common law rule or court order restricts access²²."

27. According to then Supreme Court Chief Justice Beverly McLachlin, open justice serves three important functions (internal citations omitted):

²¹ [Access court files, documents and exhibits, Section 3: Public access to civil court files and documents](#)

²² Respondent's Application Record, Exhibit A at pg. 8.

- 1) it assists in the search for truth and plays an important role in educating the public by permitting access to and dissemination of accurate information;
- 2) it ensures and enhances judicial accountability, deterring misconduct by judges, police officers and prosecutors; and
- 3) it performs a therapeutic function by permitting the community to see that justice is done. In these ways, the open courts principle works to preserve public confidence in the administration of justice, which is essential to the rule of law²³.

28. Against this backdrop, Applicant sought, and was refused access to the list (dockets) of civil cases maintained (in its FRANK database), that had gone to trial, broken out into bench and jury trial, at various courthouses, for the years 2015 through 2021 (and now 2022), along with accompanying case numbers. From that information, Applicant would have been in a position to determine (and publish) how long it was taking matters to reach jury and non-jury trial at various Ontario courthouses (for each individual year), (and/or to obtain access to those individual judgments).

29. This information is not currently being published by the Ontario Superior Court. Regarding this, the Ontario Court of Appeal has opined that:

“It is an unfortunate state of affairs that neither the Superior Court of Justice in Ontario nor the Court of Appeal for Ontario publishes information about how they manage and dispose of their caseload. The lack of detailed, consistent operational data from those courts and the resulting lack of transparency, impedes the ability to understand and then improve the performance of those courts.”

²³ [Openness And The Rule Of Law, Remarks of the Right Honorable Beverly McLachlin, P.C. Chief Justice of Canada at the Annual International Rule of Law Lecture, London, UK, January 8, 2014.](#)

and further:

“[t]he absence of comprehensive institutionally-reported data therefore makes it difficult to deal empirically with questions of litigation policy and process²⁴.”

30. Delay in proceedings has been recognized as a significant problem by Ontario’s Chief Justice Morawetz, who in his [October 3, 2022 Opening of the Courts remarks](#), stated:

“If the timeline between the commencement of a civil matter and the trial is 4 to 5 years, the civil justice system is simply not responding to the litigants. The Court runs the risk of becoming irrelevant in civil proceedings if action is not taken.”

31. As acknowledged in [R. v. C.B.C. et al., 2013 ONCJ 164 \(CanLII\)](#) “transparency is the lifeblood of democratic states” ... [t]hus, there is an expectation that the courts will operate in an open and transparent way..... Other than in extremely limited circumstances, secrecy is anathema to the operation of the courts in a democracy.... These are not revolutionary precepts.”

32. In this regard, the reasoning of the Court of Appeal for British Columbia in [R. v. Bacon, 2020 BCCA 140 \(CanLII\)](#) (while construing section 486 of the Criminal Code (Exclusion of the Public)) is illustrative:

“[W]e are disquieted by learning that some of the pre-trial proceedings proceeded off-docket, and so were not made known to the community. Closing a court room is a serious and rare step. It is even more serious to hide the fact a hearing is ongoing.

Such secrecy in the court process is an anathema. A court should not hide the fact a hearing is proceeding. Listing a case as an *in camera* proceeding provides slim information to the public but it is not nothing. In the minimum, doing so informs the public that the court, which is their court, is grappling with the case listed. It allows the public to keep track of the closed

²⁴ [Moffitt v. TD Canada Trust, 2023 ONCA 349 \(CanLII\)](#).

proceedings and it allows for applications to the court in respect of the closure: e.g., [*Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 \(SCC\)](#). In our respectful view, proceedings that do not allow for that minimal degree of oversight should not occur.”

If ongoing hearings are not to be hidden (and are hence public), it strains logic to justify why concluded (public) hearings should be hidden, after same have occurred, in public.

33. This Application is similar to [*A.G. \(Nova Scotia\) v. MacIntyre*, 1982 CanLII 14 \(SCC\)](#), which authority is controlling. In that case, MacIntyre, a journalist (but standing only as a member of the public), sought access to search warrants and supporting material, which request was initially denied. MacIntyre brought suit, seeking an order that such warrants were matters of public record and could be inspected by the public upon request. He succeeded at trial, with the Judge finding that such warrants, in the control of the justice of the peace or a court official are court records available for examination by members of the general public.

34. In outlining principles governing access to judicial records, the Supreme Court outlined several factors to consider, including respect for the privacy of the individual, protection of the administration of justice, implementing the will of Parliament that a search warrant be effective in the investigation of crime and a strong public policy in favor of openness in respect of judicial acts. The rationale for openness was set forth as follows:

'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'

35. In resisting production of judicial records (issued warrants and supporting materials), the Attorney General of Nova Scotia advanced a privacy argument, to the extent that the ‘privacy’ of litigants required that the public be excluded from court proceedings. Where a search warrant was executed and nothing found, the Supreme Court agreed, finding that openness must be curtailed to protect the innocent. Otherwise, where search warrants were issued and items found, a member of the public was entitled to inspect the warrant after issuance, and the information upon which the warrant was issued. In so holding, it reiterated that:

“At every stage the rule should be one of public accessibility and concomitant judicial accountability.....

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance.”

36. Applying the principles from *MacIntyre* to this case, there are no privacy interests to consider, as Applicant is simply seeking case numbers (which Respondent is in the business of publishing in bulk on a daily basis). The provision of such information will further the administration of justice, by allowing for the development of data called for by the Ontario Court of Appeal, to assist with questions of litigation policy. Such data will likewise help to make the justice system fair and accountable, by providing information on Court operations, which may lead to either public praise or criticism. Moreover, the will of the Provincial Parliament is set forth in the *Courts of Justice Act*, which mandates access to such records, and as in *MacIntyre*, the same strong public policy in favor of openness applies.

37. Such conclusion is supported by the recent remarks of Chief Justice Wagner, who while noting the dwindling number of journalists covering Canadian courts, asserted that

“[A] strong democracy relies on citizens having access to diverse and reliable sources of information, so that they may form opinions, participate in public debates in a productive way, and hold governments and individuals to account,”

and

“Open, independent, and accessible courts build public trust and confidence. When people trust national institutions, they are more resilient to misinformation and less likely to share it with others²⁵.”

It is trite law that the Ontario Superior Court is part of the judicial branch of government.

38. Accordingly, to rebut the presumption of openness, the resisting party must establish the following:

- 1) court openness poses a serious risk to an important public interest;
- 2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- 3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[*Sherman Estate v. Donovan*, 2021 SCC 25 \(CanLII\)](#) at para. 38.

39. In this case, it is difficult to conceive (and Respondent has not advanced any) what, if any interest would be superordinate to the disclosure of both the number of civil cases that have gone to trial at the identified courthouses by year, along with associated case

²⁵ [Chief Justice of Canada Richard Wagner notes decline in press coverage of courts at CBA forum, Aidan Macnab, Canadian Lawyer, June 22, 2023.](#)

numbers. While the Superior Court itself²⁶ asserted ‘personal identifiers’ such assertion is at odds with its own practice in publishing its ‘Daily Court Lists.’ It is also at odds with the Canadian Judicial Council’s Model Policy for Access to Court Records in Canada (given same expressly states that Personal data identifiers do not include a person’s name, and that same provides for access to dockets), or even the Respondent’s own web page interpreting section 137 of the Courts of Justice Act²⁷. Certainly, much more personal information is contained within search warrants, and if that information is accessible, it strains logic as to why civil case numbers, including specifically the first 6 digits thereof, would not be (especially given the volume of civil case numbers published on a daily basis) upon completion of a trial, despite being published immediately prior thereto. Recall from [REDACTED] cross-examination transcript that other means of obtaining this information (i.e. production of verdict forms and decisions) was frustrated and/or outright refused.

40. Likewise, Respondents have not satisfied, nor attempted to satisfy any the elements of the test from [Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41 \(CanLII\)](#) set forth in *Sherman Estate* above. Instead, Respondent’s position is effectively that the records sought are not the Respondents, and instead are solely within the custody and control of the Ontario Superior Court.

41. Applicant asserts he is entitled to the information sought, by virtue of the open courts principle, Respondent’s own policy on [Public access to civil court files and](#)

²⁶ See Application Record at pgs. 26, 35. To the extent that this Court is being asked to rule upon its own decision (or that of more senior Judges holding supervisory authority), the doctrine of *nemo iudex in causa sua debet esse* is implicated, which is raised only to preserve the issue.

²⁷ [Access court files, documents and exhibits, Section 3: Public access to civil court files and documents](#)

[documents](#) and the Canadian Judicial Council’s Model Policy for Access to Court Records in Canada. Specifically, the information sought is a list, maintained in Respondent’s FRANK database. Moreover, section 137(3) of [Courts of Justice Act, R.S.O. 1990, c C.43](#) is directly on point and expressly provides for such disclosure as follows:

Court lists public

- 3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

In refusing production, Respondent has in effect, made all judgments secret²⁸. Moreover, this information has in the past been provided to Applicant, making it difficult to appreciate what has changed that would now bar disclosure.

II. RESPONDENT’S POSITION NULLIFIES THE OPEN COURT PRINCIPLE

42. Respondent has responsibility for the administration of justice in the province of Ontario²⁹.

43. Thus, requests for judicial records are first directed to the Respondent, with some (including those deemed ‘bulk’) then being forwarded to the Superior Court of Ontario for approval. Where in cases like this, such approval is denied, the procedure to challenge same is to file a claim against the Attorney General for access to such records. *See e.g. [A.G. \(Nova Scotia\) v. MacIntyre, 1982 CanLII 14 \(SCC\)](#)* as claims cannot be brought against Judges for acts done in relation to their judicial functions. [Taha v Clements, 2021 PECA 5 \(CanLII\)](#).

²⁸ In this respect, perhaps the Ontario Superior Court is attempting to follow the lead of courts in B.C. and Quebec, in holding secret trials, though the practice is generally frowned upon? *See i.e. [Re Designated person c. R., 2022 QCCA 984 \(CanLII\)](#).*

²⁹ Lesage Affidavit at para.4, <https://www.ontariocourts.ca/scj/social-media-use/>

44. Given Respondent's position that it is only the 'steward of the court records'³⁰ (i.e. akin to a 'judicial secretary' or 'a passenger on the justice system train') to hold otherwise would turn the open court principle on its head, with court records going from being presumptively accessible, to being available only at the unfettered discretion of the Superior Court of Justice (as applicants would be without recourse where such request was refused), and would further be contrary to the *Charter*. Given the purported privacy justification offered in support of the refusal, it is conceivable that the Ontario Superior Court bristles at being benchmarked against other jurisdictions (see i.e. [Benchmarking the Ontario Court System, Slaw, May 21, 2021](#)), though that is purely speculative, given the Attorney General and the Chief Justice have not yet gotten around to developing the protocol outlining, on a principled basis, when public access is appropriate to court-derived statistical information and documents (which protocol itself would most likely offend the principle of openness for the reasons set forth above).

PART V – ORDER REQUESTED

44. Applicant requests an order that civil court file numbers (such as CV-09-00379106-0000 for instance), for cases that have gone to trial, are the type of judicial records to which applicant has a common-law right of access and are matters of public record that may be inspected by/produced to a member of the public, upon reasonable request.

45. Applicant requests an order that Respondent shall, within thirty (30) days, provide to Applicant, for each of the Toronto, Newmarket, Durham, Hamilton, Brampton, Milton, London & Ottawa courthouses:

³⁰ Cross-Examination Transcript of [REDACTED] of August 3, 2023 at pg. 20, Q58.

- i) The number of cases resolved at each courthouse, for each calendar year 2015 to present, broken down by jury and non-jury trial (i.e. for 2019 for Toronto, 143 by Jury, and 91 by Non-Jury);
- ii) Civil case numbers for each case that was resolved by jury trial in each courthouse, for each calendar year 2015 to present (i.e. for Toronto in 2019, all 143 case numbers, starting with CV09003791060000, CV0900392886-0000 etc.);
- ii) Civil case numbers for each case that was resolved by non-jury trial in each courthouse, for each calendar year 2015 to present (i.e. for Toronto for 2019, all 91 case numbers);

And that such information be substantially in the form set forth at Applicant's Exhibit "1".

ALL OF WHICH IS RESPECTFULLY SUBMITTED on this September 9, 2023



Michael Lesage

SCHEDULE “A”

Cases:

1. [*A.G. \(Nova Scotia\) v. MacIntyre*, 1982 CanLII 14 \(SCC\).](#)
2. [*Cao v. Monkhouse Law Professional Corporation*, 2021 ONSC 7894.](#)
3. [*Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 \(SCC\).](#)
4. [*Moffitt v. TD Canada Trust*, 2023 ONCA 349 \(CanLII\).](#)
5. [*Named Person v. Vancouver Sun*, 2007 SCC 43 \(CanLII\).](#)
6. [*R. v. Bacon*, 2020 BCCA 140 \(CanLII\)](#)
7. [*R. v. C.B.C. et al.*, 2013 ONCJ 164 \(CanLII\).](#)
8. [*Re Designated person c. R.*, 2022 QCCA 984 \(CanLII\).](#)
9. [*Sherman Estate v. Donovan*, 2021 SCC 25 \(CanLII\).](#)
10. [*Sierra Club of Canada v. Canada \(Minister of Finance\)*, 2002 SCC 41 \(CanLII\).](#)
11. [*Taha v Clements*, 2021 PECA 5 \(CanLII\).](#)

Articles & Webpages:

12. [Benchmarking the Ontario Court System, Slaw, Michael Lesage, May 21, 2021.](#)
13. [Chief Justice of Canada Richard Wagner notes decline in press coverage of courts at CBA forum, Aidan Macnab, Canadian Lawyer, June 22, 2023.](#)
14. [How Well Is Chief Justice Morawetz Overseeing Ontario Superior Court Operations? Slaw, Michael Lesage, June 29, 2023.](#)
15. [How Long Does It Take for Civil Cases to Get To Trial In Ontario, Michael Lesage.](#)
16. [Memorandum of Understanding between the Chief Justice of the Superior Court of Ontario and the Attorney General of Ontario, May 5, 2008.](#)
17. [Ontario - Access court files, documents and exhibits, Section 3: Public access to civil court files and documents.](#)
18. [Opening of the Courts, Remarks of the Honorable Geoffrey B. Morawetz, Chief Justice of the Ontario Superior Court of Justice, October 3, 2022.](#)

19. [Openness And The Rule Of Law, Remarks of the Right Honorable Beverly McLachlin, P.C. Chief Justice of Canada at the Annual International Rule of Law Lecture, London, UK, January 8, 2014.](#)
20. [RED BLOCK, YELLOW BLOCK, ORANGE BLOCK, BLUE: WITH SO MUCH COMPETITION, WHAT DO WE DO? Justice David Brown Court of Appeal for Ontario1 14th Annual Straight From The Bench Conference Middlesex Law Association London, May 6, 2019](#)
21. [Sorry, I Don't Make the Rules: Taking Seriously Chief Justice Morawetz's Call to Overhaul the Rules of Civil Procedure, Slaw, Suzanne Chiodo, October 7, 2022.](#)
22. [Superior Court of Justice – Social Media Communication Terms of Use.](#)
23. [The Ontario Superior Court is attempting to hide poor performance behind a privacy excuse, Canadian Lawyer, Michael Lesage, March 17, 2023.](#)

SCHEDULE "B"

1. [*Courts of Justice Act, R.S.O. 1990, c C.43.*](#)

MICHAEL LESAGE

and

**THE ATTORNEY GENERAL OF
CANADA et al.**

Applicant

Respondents

Court File No. : CV-23-00000832-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
Application Commenced at Milton

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